No. 9231

United States Circuit Court of Appeals

For the Ninth Circuit

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

(Consolidated herewith are the cases of *Buck et alles vs. Lockhart,* No. 9233, and *Buck et alles vs. Tarry Inn,* No. 9232.

Appellees' Brief

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Appellees' Brief

PREFACE

We will refer to appellants as plaintiffs, and appellees as defendants. The plaintiffs are here seeking judgments against the defendants calling for maximum damages of $100,000.00 or minimum damages of $5,000.00, plus costs and attorneys' fees, because the

defendants rendered in their places of business twenty pieces of music. Before the court lays such a heavy hand upon these little defendants, the proof should be very clear that plaintiffs are entitled to the judgments sought. Defendants Lockhart and wife operate a little eating place out from Seattle. We presume the court is well aware that it will take a great many thousand sandwiches to pay such heavy judgments. We are not seeking the court's sympathy; merely showing the importance of these cases to the defendants. We insist the plaintiffs must prove their causes before they are entitled to such severe judgments; we propose to show they are not entitled to any judgments.

ARGUMENT

Plaintiffs have made such a plain statement of the cases and the issues involved, with only a few errors, which will later be pointed out, that we will not make any detailed statement.

There are but two questions of importance to be considered:

1. Were the license contracts issued by the plaintiffs to the defendants in effect on the dates of the alleged infringments?

2. Were the counsel fees allowed by the court reasonable?

Question No. 1.

Plaintiffs themselves offered in evidence the license contracts issued to the Trianon and Tarry Inn. (Tr. 85 & 105.) They admitted a similar license had been issued to Lockhart. (Tr. 101.) The general terms of all three contracts are the same. Plaintiffs denied in their reply that such licenses had ever been issued, still they introduced the contracts in evidence. An unusual performance at the best. Of course, plaintiffs are bound by their own evidence; that is basic. Suppose we examine one of the contracts. (Pls' Ex. 19, Tr. 105.) It will be noted that the contracts state the reasons for and the manner of cancellation; namely—

Par. 6 says that upon any breach or default, the Society may, upon notice, cancel the contract. Par. 7 says: "the same shall be renewed—from year to year, unless either party—shall give notice in writing by registered mail, etc." Those are plain words; not hard to understand. Plaintiffs drew the contracts; they must have known their terms. The Trianon license had been thus renewed for many years, since July, 1927.

It will be noted that *Non Payment of Fees Does Not Cancel the Contract;* only furnishes ground for cancellation. The contracts clearly reveal that there is but *one way of disposing of them, by written notice.*

And that is a fair and easy method. If a licensee defaulted in his payments, the Society could do one of two things; (a) sue for sums due under the contract, or (b) cancel the contract and, if infringements were committed, sue thereon. Apparently they chose the latter course in all of these three cases, *only they failed to take the necessary first step—they did not cancel the licenses,* as we shall presently point out. In drawing the contracts, plaintiffs could easily have provided that non-payment would work a cancellation; however, they made no such a provision. We must take the contracts as made.

It is clear that plaintiffs recognized the contracts must first be cancelled before these suits could be brought, for at the trial they went to great lengths in attempts to show that they had complied with the terms of the contracts, by introducing the letters of cancellation, (Pls' Ex. 7, Tr. 71; Ex. 21, Tr. 115, together with the postal receipts).

Here is a good place to correct a number of errors found in plaintiffs' brief. On page 4, plaintiffs say the relief sought is an injunction. They forgot to mention the trifling matter of judgments of from $5,000.00 to $100,000.00, plus costs and counsel fees. That may be only a trifling sum to plaintiffs but not to defendants. They say on several pages that plain-

tiffs offered evidence that a letter (Tr. 71) was sent the Trianon May 27, 1935. There isn't a word of testimony to be found anywhere in the record to the effect that such a letter was ever sent, by mail or otherwise. Mr. Kenin did not mail it. Mr. Stanley, then in charge of the office, says he did not mail it. The nearest they came to presenting any evidence the letter was ever mailed is in Stanley's deposition (Tr. 112). He says: "and directed it to be mailed by registered mail." So he did not mail it. At best he only directed it to be mailed. Then he made a most unbelievable statement. On page 113 of the Tr., he says he *confirmed the registration the next day by calling at the post office.* In the deposition, which is not set out in full in the Tr., he says: "I went to the post office the next day and there found it had been registered." That statement on its face looks bad; business men do not go to the post office the next day and check the records. But more of that later.

Mr. Savage denied ever having received the letter. (Tr. 62.) No return card from the post office was offered in evidence In fact no proof of any kind was offered that it had been mailed. Mr. Savage, Mr. Lyons, and Mr. Belknap went to the post office and searched the books kept by the registered mail department to see if there was any record of the

letter having been mailed either the 27th, 28th, or 29th of May, 1935, and found no record of a letter from the Society or Mr. Stanley addressed either to the Trianon or to Mr. Savage, its manager, (Tr. 128). It would appear that Mr. Stanley deliberately falsified; he couldn't have been only mistaken.

Counsel says that the testimony of Mr. Savage et al was not competent on this question. Do they contend that all the employees of the post office should have been in court, bringing with them all their records to show what they did not contain? Of course, a deed must be offered to show a conveyance of land. But if land is not conveyed, must one offer a deed in evidence that never existed? What deed? Obviously one cannot produce a deed that never existed, and it is equally obvious that one cannot produce records of a letter having been registered, if there are no such records. All they could do was to search for such records; none could be found.

But in denying credence to defendants' testimony, plaintiffs are destroying their own evidence. The only proof of the letter being mailed was Stanley's "checked the post office records." Instead of Stanley's oral statement why did not plaintiffs produce the post office records? Certainly if it is fair for plaintiffs to rely upon oral testimony *to prove the contents* of a

record, it is more than fair to accept defendants' testimony that no records exist.

On page 8 of their brief (Assignment of errors, 3) counsel say the court erred in admittting testimony as to the "contents" of the record. No proof was offered as to the "contents" of any record. Defendants merely testified that no such records existed. On page 19 of their brief, they say the court must have placed great credence upon the testimony of Savage and Belknap. No doubt he did. Whom else was he to believe? Certainly the court could not be expected to believe Stanley. Of course, counsel must stand by their clients but we seriously doubt if even they believe that Stanley went to the post office the next day, etc. But in any event, if the court erred in admitting defenants' testimony it also erred in admitting plaintiffs' testimony. (Stanley's deposition.)

We need not cite authorities on this principle. It sufficient to say that plaintiffs should remember they entered a court of equity. "He who seeks equity, must do equity," applies to all litigants, even to plaintiffs. That is an ancient doctrine, only a fairly modern expression of the Golden Rule, which probably was in effect when the shepherd kings ruled Israel. In the Sermon on the Mount, Christ said:

"All things therefore whatsoever ye would that men should do unto you, even so do ye also unto them; *for this is the law and the prophets.*" Matthew 7-12. (Italics ours.)

Doubtless even at that date this was only an enunciation of a long established principle. Otherwise, *"for this is the law and the prohpets"* would be meaningless.

It follows then that if counsel are going to deny admission of defendants' oral testimony they must also elminate Stanley's testimony as well, and that would leave no proof of any kind of the letter having been sent the Trianon. While defendants feel that plaintiffs have treated them very harshly in these suits, still we do not believe counsel really desire this court to ignore these ancient rules of fair dealings between men. After all that is what law is, or should be; rules of fair dealing. But plaintiffs seem to be free from edicts of State Courts, as we shall presently point out, maybe they are above the teachings of Holy Writ. We express no opinion. (Altho we hold one.)

But let us examine Stanley's testimony a little further; maybe there are other reasons for not believing him.

The Attorney General brought proceedings against the Society and all its members and agents, including Stanley; he was named individually. Plaintiffs' own

counsel testified (Tr. 73) that a general injunction was issued August 7, 1935, restraining the defendants therein from doing anything in connection with their business affairs. The injuncton is not set forth in full but counsel will admit that the defendants were restrained from cancelling licenses or making any collections thereon. A receiver was appointed on August 13, 1935, to take complete charge of the Society's affairs; license contracts were especially mentioned. Yet Stanley boldly testified that in spite of the court order he went down to Portland, Oregon, and there on August 21, 1935, sent out letters of cancellation to *all licensees in the State of Washington.* He says he was acting under instruction of the home office of the Society. (Tr. 113) Is it any wonder that one who would thus defy a court order would not hesitate in testifying about having checked the post office records the next day? He was in Oklahoma when he so testified; far from the reach of Washington authorities. So it seems clear that there was no competent evidence that the Trianon license had been cancelled.

Lockhart and Tarry Inn Cancellations

Except as will later be pointed out, plaintiffs do not question the validity of the receivership proceedings or that the receiver assumed control over all license

agreements. They cannot question them, because *they introduced in evidence the final court order.* Par. 7 says the receiver is instructed to turn back to the Society all agreements, licenses, etc. (Tr. 80). Moreover, Haughland, of counsel testified that the injunction was issued and a receiver appointed. (Tr. 73). Certainly the state court was not entering idle or meaningless orders. It would have been only silly for the court to have directed the receiver to collect on all license contracts up to January 1, 1936, and then turn over all license contracts to the Society, if no such license agreements were even in existence. If Stanly had the power to cancel the contracts after the appointment of the receiver, then the court's order would have been a nullity. If it were a nullity then why did counsel introduce it? But having introduced it plaintiffs must concede that the receiver was in charge of the contracts from his appointment August 13, 1935, to his discharge June 8, 1936. Then it follows that Stanley had no authority to cancel these and *all* other licenses on August 21, 1935. At that time he had no more authority to cancel them than had a mere stranger. Plaintiffs say they were the only cancellation notices ever sent the defendants.

Plaintiffs' counsel, Haughland, was present in the state court when that final order was entered. We need not concern ourselves about the laws governing

the power of the state court to appoint such a receiver, and the power of the receiver over these contracts. The fact that plaintiffs introduced the final order in evidence is sufficient to control plaintiffs; they thereby indorsed whatever the order contains.

But the cancellations would have been faulty had they been sent by competent authority. Even in those letters, sent in defiance of court orders, no mention is made of failure to pay fees, or is there any other breach stated. Indeed, without considering the state court injunction the cancellations were faulty. The license contracts could not be cancelled merely at the whim of the Society. They could be cancelled only for *cause, or at the end of the yearly date of the contract.* The Tarry Inn license was dated March 1, 1935. It could not have been cancelled on September 1, 1935, except for cause. It could not have been cancelled otherwise before March 1, 1936. But Stanley fixed the date September 1, 1936, *without citing any beach of the contract.* (Tr. 115). Even common courtesy, to say nothing about the plain terms of the contract, would have required a reason given for cancellation. Stanley's cancellations were of no consequence in any view of the case.

Plaintiffs destroyed their reply by introducing the very contracts they denied were in existence. Then they proceeded to destroy those letters of cancellation by the testimony of Haugland that a receiver had been appionted eight days prior to the sending of the cancellation letters. (Tr. 73).

On page 40 of the brief they say: "There is no proof to rebutt the cancellations." Oh! Yes there is; plaintiffs' own evidence. (Tr. 80, Par. 6 and 7). *The court commands the receiver to collect on all license contracts up to January* 1, 1936, and then turn *all contracts* back to the Society. If all contracts had been cancelled as plaintiff's witness testified (Tr. 114) or if the receiver had failed to "adopt" them as counsel contend in their brief on page 38, then to what contracts did the court have reference? To *all* contracts; not just the ones the receiver had "adopted." Plaintiffs themselves introduced that court order. (Tr. 80). They are bound by their own evidence. They cannot be here arguing that the contracts had been cancelled by Stanley. The state court did not recognize Stanley's cancellations. Then why should the trial court have done so in these cases, or why should this court pay heed to them? (There seems to be but one reason for appealing these cases: just to wear out weak opponents. Stanley and

the plaintiffs will probably defy this court's orders, any way, if their past conduct is any criterion.)

The rule that parties are bound by their own testimony is as old as the hills. Even in the Book of Job (Chap. 15, 6) we read:

> "Thine own mouth condemneth thee, and not I: yea, thine own lips testify against thee."

We dare say that those words when thus uttered were very old. Historians are not agreed as to the date of the writing of the book of Job, but certainly it is of great antiquity. Doubtless the principle was then well founded, and had been for centuries.

Plaintiffs' evidence, this court order, clearly shows the contracts were in effect June 8, 1935, the date of the order. What transpired between June 8 and December 1, 1936, is unknown to the defendants. There is no record of any activity on the part of the Society between those dates; no record of the Society ever having mailed the defendants the usual monthly statements, or advised them that the Society was again permitted to do business in the state or that their old licenses had been cancelled. The nearest they came to that is found in a letter December 8, 1936, written by Kenin, wherein he says he was under the "impression" that all music ushers of Washington had been informed that the Society could resume operations.

(Tr. 65). It would seem that plaintiffs brought these suits carelessly; they were merely under the impression they had causes of suit. That is the best light that can be given the matter.

Let us assume that Kenin was endeavoring to tell the truth; still we find his testimony no more dependable than Stanley's (Tr. 101). He says the Lockhart license was cancelled October 1, 1935, *for delinquency*. That is completely at variance from the contents of the cancellation letter (Tr. 116); it gave no ground for cancellation. He also said Lockhart owed for the period, January 1, 1935, to October 1, 1935. He knew better than that. Plaintiffs' other evidence, the State Court decree, took all those fees from the Society and gave them to the receiver. Whether Lockhart paid or still owes the receiver is of no concern of plaintiffs. Kenin is a lawyer; he knew when he testified that Lockhart did not owe the Society for the period stated. He also knew the letters sent by Stanley were mailed without authority and contained no reason for cancellation. He was on the witness stand when the Lockhart letter was offered in evidence; and he also introduced the court decree. He couldn't very well have been mistaken about such vital matters, or at least he should not have been.

The receivership case was dismissed in June, 1936.

But there is no evidence that any of the defendants knew of it. Instead of plaintiffs promptly advising all licensees of that fact and sending them statements for fees due, or valid letters of cancellation, what did plaintiffs do? In December, 1936, they at least led the defendants to believe that they were still forbidden to do business in the State of Washington. Their letters to Lockhart and Tarry Inn (Lyons) (Tr. 98 and 121) contain this statement:

> "We have heretofore endeavored to maintain in the State of Washington—a branch office of the Society—. However, local State officials have taken such steps as to nullify our desire to render such service, etc."

What would be the natural deductions for defendants, or even their counsel, to draw from such statements? Simply this: that they were still barred from the State, of course. True, defendants are supposed to know the law but they are hardly expected to keep track of plaintiffs' litigation, especially when they receive such letters.

Let us further examine those letters (Tr. 98 and 121). Even assuming defendants had never been issued licenses, the signing of applications would not have prevented these suits. No statement is found in the letters that if applications were made that suits would not follow. In fact, the contrary appears:

"—— we have no alternative—but to bring suit, etc." So an application would have availed defendants nothing.

But supposing plaintiffs in sending out these threatening letters were trying to compel defendants to take out new licenses, we must assume the new contracts would be like the old ones—blanket licenses. That is, the defendants would have to purchase the rights to all the Society's millions of compositions to get the few desired; not an equitable matter by any means, but we will not go further into the matter.

The first evidence we have of the Society's activity is Kenin's letter to the Trianon December 1, 1936. (Tr. 88). Therein he claims the Trianon was infringing the Society's copyrights. He doesn't attempt to cancel the old license then in existence. After seeing how the Society had attempted to defy and nullify the state court's orders in sending out bogus letters of cancellation is there any wonder that these defendants were somewhat skeptical and confused as to just what had transpired in the receivership proceedings? Kenin's first letter was dated December 1, and the complaint was verified December 21, only twenty days later. Rather rapid work.

Possibly defendants were confused as to their rights, but their confusion did not lessen their rights. Sup-

pose that my uncle dies a millionaire and leaves me his fortune. I believe him to have died a pauper. My erroneous estimate as to his worth does not rob me of his estate. So the defendants' rights are not what they may actually have believed them to be when talks and correspondence were going on. They may really have believed the state court had cancelled their licenses. But their beliefs or doubts did not take away their rights under the contract. There are at least three reasons why the cancellations mailed from Portland were faulty: 1. They were sent in defiance of a court order. In fact, the letter prcatically so states. "The rights of our members, as copyright owners, are in no way affected by the pending litigation." (Tr. 116). 2. The receiver on August 21 had charge of the license contracts. Mr. Stanley had no authority over them whatsoever, consequently could not have cancelled them. 3. The letter sets forth no grounds for cancellation, such as non-payment of fees, etc.

Plaintiffs' evidence, the state court order, (Tr. 80), shows the license contracts were in effect June 8, 1936. No cancellations were sent after that date. So we are ready to turn to plaintiffs' other out, "abandonment."

ABANDONMENT

Plaintiffs tried the cases on the theory of having cancelled the license contracts. Not one word of testimony was offered at the trial regarding "abandonment." That term or any similar term or expression is not found anywhere in the record. Abandonment was not pleaded nor was it testified to in any manner. At the trial plaintiffs seemed perfectly satisfied with their proof of cancellation. Weeks afterward the defendants first learned of the abandonment theory when they saw it in briefs filed with the court.

But in what manner had defendants abandoned the contracts? Let us examine them. What were they about? Merely this: the Society sold to the defendants the right to perform in their places of business all of the musical works of the Society's members, and for those rights the defendants agreed to pay certain sums of money. The Triannon had held its license for many years, since 1927. It had been automatically renewed from year to year. On that contract it had paid $2400.00. It was a vital contract.

After the license contracts were issued the defendants naturally took charge of such pieces of music belonging to the Society as was required for their needs. *They took possession of the Society's property as they had a right to do. And they have never*

released such rightful possession. At least, certainly not up to the dates of the alleged infringements. The agents of the Society called at the defendants' places of business and found what? That all the defendants were still in possession of their musical works. They had not abandoned the property covered by the contracts; at least plaintiffs so testified. Again they are bound by their own evidence.

But where, when, in what manner had defendants abandoned the contracts? No one knows. The most that can be said is that they had not paid their fees, although they had paid every statement sent them. And Mr. Savage of the Trianon expressed his doubts about the Society's right to do business in this state; that it was an illegal institution; that it illegally controlled music. But such doubts and expressions could not be termed an abandonment of a corporation's contract. In several of the cases cited by counsel the licensees rebelled at the terms of their contracts; but their displeasure did not deprive them of their rights under those contracts. Between June 8 and the date of the alleged infringements committed in November and December of that year, none of the defendants had heard from the Society. Kenin testified that he had not sent any statements. (Tr. 110). Continuing in possession of the plaintiffs' property did not show an intention to abandon it. One cannot

be present and absent from a meeting at the same time. And by the same logic one cannot abandon a piece of property and at the same time keep possession of it!

But non payment of fees did not work an abandonment. Par. 6 (Tr. 107) says that failure to make payments is only a ground for cancellation. But from what date had they failed to make payments to the Society? Only from June 8, 1936, for the receiver was in charge up to that time. Whether they paid the receiver is of no concern to plaintiffs, for the fees to January 1, 1936, went to the receiver. (Tr. 83).

Plaintiffs quote from a letter written by Mr. Savage of the Trianon (Brief 14). Apparently Mr. Savage felt the Society had not treated the users of music fairly on the matter of rates. He suggested that the Society meet with a committee of users to discuss the rate question. But can that be interpreted as an abandonment of existing licenses? Hardly. A hundred committees might meet without effect upon their signed contracts. They might suggest a higher or a lower rate or even sign applications for new contracts without in any way altering or changing the rights of any of the parties thereto.

We have no quarrel with plaintiffs' cases on aban-

donment. We will first cite our own authorities on the subject and will later analyze their cases.

"American Jurisprudence," Vol. 1, p. 12, No. 17:

> "Abandonment must be made to appear affirmatively by the party relying thereon.—As a rule therefore, abandonment or an intention to abandon, is not presumed.—The burden rests upon him who set up abandonment to prove the same by clear, unequivocal and decisive evidence."

"Sets up," "appear affirmatively," "abandonment," do not appear anywhere on any page of the record, either in the pleadings or in the evidence, or is there any similar terms used. This authority says the *burden is upon him who sets it up to prove abandonment.* They neither sets up abandonment nor offered any proof thereon. *Plaintiffs are not assuming the burden.*

Certainly if plaintiffs had pleaded abandonment they would have had to offer definite, "clear, unequivocal and decisive evidence" in support of such pleadings. Then merely because they failed to plead abandonment can plaintiffs be relieved of the burden of offering equally definite proof thereof—stated in terms the court and all parties concerned would understand? Not only did plaintiffs fail to plead abandonment of the contracts, but they denied in their reply that any contracts had been made. The first defendants heard of the theory of abandonment

was in a brief filed by plaintiffs weeks after the trial. Had they pleaded abandonment defendants would have had an opportunity to refute it at the trial. Under the pleadings all defendants had to do was prove they were licensed. *Plaintiffs* relieved them of that burden by introducing the contracts.

> "Mere lapse of time does not work an abandonment."—Moon vs. Rollins, 36 Calif. 333, 338.
>
> "The burden of the issue was upon the defendants." (The party who had set up abandonment.) — *Bradley vs. Blandin,* 110 At. 314. (No. 13-16).
>
> "The burden of showing a discontinuance, vacation or abondonment is upon the party who asserts it."—*Town of Basic City vs. Bell* (Va.) 76 S. E. 336 (338).

Many other cases might be cited along this line. Both the text books and the cases discuss very little the matter of pleading abandonment, but all those which do mention it say it should be pleaded. And all the cases which we have read dealing with this subject were tried on the theory of abandonment and the inference is that abandonment was pleaded. *That was true in all of plaintiffs' cases.* But *all* the text books and cases on contracts say that such matters as fraud, breach, coercion, failure of consideration,

modification, etc., *must be pleaded.* Can it then be supposed that a matter equally as important, such as abandonment, may be relied upon without pleading it? On page 26 of their brief plaintiffs quote from Restatement of the Law on Contracts. Their quotation is taken from pages dealing with "Rescission" and that high authority says that such matters must be pleaded. Plaintiffs relied upon cancellations entirely at the trial, and rely upon them still. But if the court fails to recognize them, then they turn to abandonment. It would seem that some date should be fixed at which they must make up their minds. We suggest the date of their pleadings; certainly not later than the date of trial.

A large number of the cases we have found dealing with abandonment were foreclosures of real estate contracts. *And in every case there had been an abandonment of the property in question.* In not one case do we find the defendant remaining in possession of the premises. It is only absurd to claim an abandonment when the defendant still keeps control of the property, as plaintiffs herein accuse the defendants of doing.

These cases had been pending nearly two years before they came on for trial; during all that time defendants' answers contained the allegation that

defendants held licenses. Plaintiffs had ample time in which to have pleaded in their reply "abandonment." But no mention was made of it until after the trial was over. Had they pleaded abandonment then both sides could have offered testimony on that important issue. The trial court could not pass upon the testimony that plaintiffs should or could have offered: *It could not find that plaintiffs had proven abandonment by "clear, unequivocal evidence."* When did abandonment take place? The record is silent. *Yet the court is accused of erring because it did not find there had been an abandonment, without any testimony whatsoever being offered on the subject.*

The authorities are uniform in holding that a judgment must conform to the pleadings. That principle is so well established, we will not quote authorities. Then the court could not have made a finding that the defendants abandoned the contracts.

FORFEITURES

The courts are uniformly against forfeitures. This is so well known that we will burden this brief with but one citation.

> "The intent to abandon and the *actual relinquishment* must concur, for courts will not lightly decree an abandonment of property so valuable as that of water in an irrigated region."

(Italics ours). — *Miller vs. Wheeler,* 54 Wash. 429,435.

The defendants in the cases at bar were possessed of valuable rights; at least great value is placed upon them. They claim that Lockhart damaged them, by playing only eleven pieces one evening, nearly $3,000.00. Does it seem that merely because he had not paid his fees between June 8 and December 1, that he should be subjected to such severe penalties? Especially when the fault lies more with plaintiffs than with Lockhart? At least they should have mailed him statements.

Lockhart and Tarry Inn Cases

On page thirty-six of their brief, counsel argue that Lockhart should be penalized because he did not keep a file of his correspondence. A pretty severe doctrine, even though the contracts had made such requirements essential, which they did not. They say: "He does not state that he is possessed of a license." Was it necessary for him to prove a license had been issued to him when plaintiffs testified they had cancelled his license by Stanley's having sent that letter of cancellation from Portland? How could they have cancelled Lockhart's license if one had never been issued to him? True, his license was not offered in evidence, but Kenin testified for plaintiff

(Tr 101) "I can't give the date of its issuance. Can give the date of its cancellation. Cancellation notice sent August 21, 1935." That is a definite admission Lockhart had been issued a license. Once issued, it would remain in effect until it was cancelled according to its terms. The only evidence of its having been cancelled is Stanley's letter.

Lockhart paid $90.00 per year under his contract. He owed at most only for the year 1936, or $90.00. In a suit on the contract that is all plaintiffs' could have collected. But plaintiffs here sued him on eleven counts, calling for maximum damages of $55,000.00 or minimum damages of $2,750.00 plus costs and counsel fees, making a minimum judgment of well over $3,000.00. That is probably the reason why plaintiffs sued on infringements instead of on the contract. In so doing they stool to win, if successful, thirty to fifty times as much. Apparently plaintiffs were smarting over the receivership proceedings so they endeavored to make up their losses on these little defendants; otherwise, why the eleven counts against Lockhart alone? There must have been some good reason for these heavy demands.

Supposing Lockhart had never been licensed. What were the actual damages suffered? What value did the Society place upon the music of its members?

Well, Lockhart's contract was for $90 per year, or about 25 cents per night. So the actual damage suffered was only a few cents. But they are here seeking damages from $3,000.00 to $55,000.00 against Lockhart.

Counsel says on page 36 of their brief that no witness was called for Tarry Inn. Why should there have been? Plaintiffs introduced the license contract. That is all the defendant needed to do. (Tr 105) That license granted the right to perform the music in question, until cancelled, *at* 1409 *First Ave.,* Seattle. Kenin testified; "I know it refers in the contract to the Spider Web at 1409 First Ave., and that is the same location as the Music Hall." (Tr. 110) There is nothing in the contract to prevent the license from changing the name of the place everyday if he wanted to.

On page 39 of their brief they say that the Tarry Inn license was to continue only so long as the present policy is maintained—"Namely, not more than three musicians." (A pretty sever regulation; but let it pass.) The contract *doesn't say any such thing.* It reads (Tr. 108) "This license *rate* to be in effect etc." "This license *rate"* is altogether different from saying "this *license* to be in effect, etc."

True, the Society could have cancelled the license because four musicians had ben employed instead of

three, but that fact did not cancel the contract. Moreover, complaining about the four musicians is a recognization that Lyons Music Hall and the Spider Web were one and the same. Tarry Inn had violated its license contract by employing four musicians in the *Lyons Music Hall*, is a fair interpretation of their testimony. (Tr. 110).

On page 37 they refer to Mr. Heiman. Let us suppose that Mr. Heiman suggested a new license contract to start January 1, 1937. Of what possible consequence is that? A mere talk about a new contract would not cancel the old one. Maybe Heiman hoped to obtain for Lockhart a better rate, one-half or one-third the rate then in effect. Of course, under such circumstances he might advise Mr. Lockhart to sign a new contract. There is no evidence to the effect that Mr. Heiman had authority to bind Lockhart or even that he ever advised anyone that Lockhart's license had been cancelled. The Lockhart answer on file is signed by Heiman; it is there stated that Lockhart still had a license at the time of the alleged infringements. Whether Heiman knew at the time he talked with Meriwether that Lockhart had ever held a license or that the receivership proceedings had been terminated does not change or limit Lockhart's rights granted him under the con-

tract. Suppose that Heiman actually believed the letter of cancellation to be valid; that does not abolish Lockhart's rights. Of course, there was much confusion about the effect of the receivership matter. *Even the Home Office of the Society, undoubtedly acting upon advice of counsel, instructed Stanley to ignore them.* They say in those famous and unusual letters of cancellation "The rights of our members—are in no way effected by the pending litigation." Is it to be wondered at that Mr. Heiman or these defendants were somewhat in doubt of their rights, when the Society was? If the Society were not confused, that is all the worse, for it was then definitely and intentionally defying the court. These defendants are not lawyers and may have been ignorant of their rights. There is no evidence that Heiman, Lockhart or Tarry Inn had ever ben advised that the receiver had been discharged and the state case closed. They were not parties to the state suit. We can assure the court that Mr. Heiman knew practically nothing about the State case when he was supposed to have participated in the negotiations for new licenses. Having received at least one phoney letter of cancellation and having been told by Kenin (Tr. 98) that the Society was still banned from the State can these little people be blamed if they were somewhat

in doubt about these matters? The defendants may have been in doubt about their rights, but the counsel who is writing this brief has never been in doubt about the effect of the letters of cancellation sent by Stanley; he accordingly advised his clients they were still licensed.

PLAINTIFFS CASES

Gerlach-Barklow vs. Morris and Bendien, 23 F. (2nd) 159. (Page 15, Plaintiffs' brief).

This case correctly held the burden of proving a license was on defendant. But the plaintiff there did not prove the license for the defendant as plaintiffs herein did.

Stodart vs. Mutual Film Corp., 249 Fed. 507. (Page 16.)

We do not believe counsel read this case. We do not find the quotation given. Their quotation reads, "Defendant sued—defendant had burden of proving that issue."

The defendant therein did not sue, he was sued. The *burden* of proving in that case was the burden of defendant showing title in itself by purchase from a third party.

Burton vs. State Gas Co., 188 Fed. 161. (Page 16.)

In plaintiffs' quotation we find the following: "The

circuit court found it was terminated by the appointment of a receiver." But the court in the Washington case made no such finding. In fact, the final decree (Tr. 83, No. 6) recognized the licenses and ordered them turned back to the Society. Plaintiffs introduced the decree; they are bound by it. Moreover, the contracts there (Burton case) terminated at will, while in the cases here they are not.

Schellberg vs. Empringham, 36 Fed. (2nd) 991, Page 995. (Page 16.)

This case concerned a written article on medical treatment. Of course, the burden was rightfully placed upon defendant to prove his license because the plaintiffs did not prove it for him, as was done herein. We thank counsel for citing this case. There is nothing in it to suggest even half the legal services were performed that were rendered herein. Yet the court there awarded plaintiffs $2,500.00 as counsel fees. There were but three counts, while here there are twenty counts. There they sought but $50,000.00 maximum damages, while here the maximum is $100,000.00.

Russell, et al vs. Excelsior Stove, 120 Ill. App. 23. (Page 23.)

The court there held the defendant had made a "positive, unequivocal refusal to comply with its

terms." (Page 30.) The defendant sought a set-off while in default. No demand for payment was ever made of defendants herein to make payments. This case was tried on the theory of abandonment with definite proof offered thereon. But here abandonmen twas not even mentioned.

Reichert vs. Mulder, 235 N. W. 680. (Page 23.)

This case also was tried on the theory of abandonment. The parties had entered into a written contract; the defendant tried to prove an altogether different contract after having operated under the written one for twelve years.

Baker vs. School District, 233 N. W. 897. (Page 23.)

This case also was tried on the theory of abandonment. The teacher had abandoned the subject matter of the contract, her school, and relinquished all claims under her contract. Both parties had talked over the matter on the "abandonment theory." No damages were shown in any event, so the court was bound to hold for the district.

Rochart vs. City of Mount Vernon, 251 N. Y. S. 514. (Page 24.)

Plaintiff, an architect, sent in his bill and was paid in full; that ended the contract, of course. The matter sued upon referred to a different project from

the one named in the contract and was twelve years later.

Lathrop vs. Rice & Adams Corp., 17 Fed. Supp. 622. (Page 28.)

This case ought to be a lesson for counsel. For there the plaintiffs did what this plaintiff should have done, they brought suit on the contract. The court there says. (p. 626.)

> "No unequivocal notice has been given by defendant to plaintiffs that it was not using the inventions of plaintiffs.—A licensor is entitled to assume that his license remains such until the latter, *by a clear, definite, and unequivocal notice eminating from lawful and competent authority, throws off the protection of the license and stands admittedly as an infringer.*" (Italic ours).

What better case could be found for defendants. It clearly points out that an *"unequivocal notice"* must be sent by *"competent authority."* That thought is repeated many times in the opinion. This case, of course, was tried on the theory of abandonment. But in the cases at bar we find no *unequivocal notice* or notice of any kind eminating from "competent authority" or from any source whatsoever that the contracts were to be considered cancelled.

Hazeltine Research Corp. vs. Freed, Etc., 3 Fed. (2nd) 172, at 178. (Page 29.)

Also it is hard to understand why counsel cited this case. It, too, goes against them. This was a

suit to CANCEL a patent license contract, which plaintiffs had openly entered into. Counsel quoted from Par. 5, page 178, but forgot the preceding paragraph. It reads:

> "It is for this reason — it seems to me, that it is frequently and correctly said that the *mere non-payment* of compensation, in the absence of a clause in the agreement, is no ground for taking away the right to practice the invention."

Then counsel might have continued quoting from Par. 5, which reads:

> "Even in such case the non-payment is but a part of the *necessary proof* on the main issue." (Italics ours.)

The contract in that case was similar to the ones here before the court; they do not provide for automatic cancellation for mere non-payment of fees. A *written* and *valid notice* must be mailed, setting forth proper grounds for cancellation.

Then on page 179, the opinion adds:
"Equity does not favor forfeitures."

In this case the defendant endeavored to obtain a more favorable contract; still the court held that such an endeavor did not work a forfeiture of the existing contract. There the payments were much farther in arrears than in the cases at bar.

The court makes a very pertinent statement on page 177:

> "The truth is that such grievances of fraud or mistake as now appears is a sham, and was never thought of until this lawsuit,, and was not really worked out then, until most able counsel had vigorously put the answer together."

Even there they pleaded the fraud and mistake. And the case was tried on that theory. But here the abandonment was not pleaded; the cases were not tried on that theory. Abandonment was a mere afterthought of "able counsel" made long after the trial.

Hunt vs. Moline Plow Co., 52 Fed. 745. (Page 30.)

Just why this case is cited we fail to perceive. The cases here on appeal are for alleged infringements. In discussing the above case, counsel seem to be talking about a suit for royalties. But there the *licensee had written a letter cancelling his contract.* Of course, the plaintiff in that case could not sue for royalties years later on. Is that any reason for herein granting plaintiffs these severe judgments?

American Streetcar Advertising Co. vs. Jones, 142 Fed. 974. (Page 30.)

Here no written contract was entered into. The plaintiffs sued upon a contract that might possibly have been interpreted from the letters written by the parties. On page 977 the court said:

> "That the defendants did not understand that

they had entered into any contract, etc.'

We fail to see wherein this case has any bearing on the issues involved in the cases at bar. The contract there failed because the gods in question were not of sufficient merit to sell to the public.

American Jurisprudence, Vol. 12, p. 959, Sec. 382.

"If one party refuses to perform, etc.'

But there is no evidence of any kind in the cases at bar that the defendants failed to pay every statement mailed to them; in fact the testimony is directly the opposite. This authority refers to "Repudiation." But repudiation and abandonment are not similar terms by any means.

Computing Scale Co. vs. Barnard Co., 259 Fed. 250. (Page 31.)

This was a suit for royalties, not for infringements. The contract there could not be cancelled merely at the wish of either party. If the inventive device was a success, the contract stood; that was a matter of fact. If it were a failure, the contract was subject to cancellation. The licensee thought the device faulty and so advised the owner. The court said (Page 254.):

> "If he knew the Scale Co. deemed the contract cancelled—and kept silent for the longest period permitted by the statute of limitations, it must at once be evident that he must meet the charge

of estoppel so arising."

The Society did not know that any of the defendants deemed the license cancelled. They had never event talked with Tarry Inn at all, or with Lockhart about a license. (Tr. 104.) In any event we see nothing in the above case of assistance in deciding the cases here on appeal.

> *American Pastry Products Corp. vs. United Products Co.,* 39 Fed. (2nd) 181. (Page 39.)

This case was decided correctly, but it does not apply here. Of course, if Tarry Inn had opened a new place in Spokane or elsewhere, the license issued for 1409 1st Ave. would not have been sufficient. But the testimony of Mr. Kenin (Tr. 110) was to the effect that the defendant had issued a license to operate a place at 1409 1st Ave. The fact they referred to four musicians at the same place (Tr. 105) shows they all knew it was the same business. There was nothing in the license to prohibit the change of name of the place.

> *Kemmerer vs. Title and Trust Co.* (Ore. 1918), 175 Pac. 865. (Page 27.)

Here the plaintiff had removed himself and his personal property from the land and wrote a letter stating plainly that he was abandoning the property.

Of course, the court held he could not compel repayment of sums paid under the contract.

MISCELLANEOUS ERRORS IN PLAINTIFFS' BRIEF

On page 7, plaintiffs speak of the Society closing its office, as though that would work a cancellation of the contracts. They could have closed all their offices but that would have no effect upon the contracts. And on page 11, they say: "This resulted in a voluntary closing of their offices." The Society did not close its office voluntarily, or involuntarily; the court injunction closed it, or rather the receiver took charge of it. The only closing on the part of the Society took place at midnight when this same Stanley unlawfully entered the offices after the appointment of the receiver. He probably closed the door when he went out. He left that same night under cover of darkness for Portland, where, in defiance of the court order, he sent out the letters of cancellation. All this is to be found in the records of the state case. (Also Tr. 113.)

At the bottom of page 29 of the brief, counsel ask what chance would plaintiffs have in suits for royalties. That is of no concern to this court. Possibly plaintiffs fear that their conduct in defying the state court orders might prejudice other courts against

them in suits for royalties. The defendants confess that plaintiffs have not made a very good record in the courts of this section of the country. It was wholly their own misdoings that lost these cases. But their lack of confidence in suits they might bring for royalties is no reason why this court should inflict such severe penalties against these defendants as are herein requested. Just what handicaps plaintiffs will suffer in their future litigaton does not here concern us. Doubtless they will many times run into their own trail of doings and misdoings, as they have in the past.

On page 29, they also say: "The receiver had been discharged with an order terminating any licenses expiring during his operation, and terminating any he many have continued, etc." They assume that the license here in question expired under the receiver or were cancelled by him. Counsel have forgotten their own evidence, the final court order, which directed the receiver to turn back to the Society all license agreements. (Tr. 83.) These contracts did not terminate under the receiver and he did not extend them. He could have cancelled them for cause, but he did not. Moreover, on page 38 they contend that the receiver did "not adopt the license contracts." If that be true, then the contracts stood

as though the receiver had not been appointed. How then could they be prevented from collecting their royalties, unless perhaps their own wrong doing interferes? In any event the contracts show clearly that they renewed themselves from year to year. The Trianon license was made twleve years ago, back in 1927.

On page 32 of brief, counsel says: "The defendant stated that the plaintiffs could not collect fees." There isn't a word of testimony to that effect. But suppose the defendants did believe the Society had been doing business illegally and so expressed themselves, and suppose also they had been coerced into signing the contracts—are those valid reasons for placing a penalty of these many thouasnds of dollars against them? In several cases cited by plaintiffs, the licensees felt greatly abused, but that feeling did not nullify their rights under their contracts.

BURDEN OF PROOF

Need we mention this? Plaintiffs themselves proved the Society had issued these defendants licenses. They introduced the signed contracts. Then where does the burden of proof rest? With plaintiffs. They must prove the cancellations in order to prevail. That, they have utterly failed to do.

COUNSEL FEES

First let us call attention to the affidavit of Clark R. Belknap, attached to the motion to dismiss (a portion of it appears on the last page of this brief), wherein he stated that Mr. Haugland asked the court to allow the same fees in the cases in which the plaintiffs prevailed that were allowed the defendants herein. But in any event, Judge Cushman is an old practioner, and has had long experience on the bench. He knew the almost innumerable times defendants had been in court. He knew of the labors which were performed and which are unknown to this court. Judge Cushman needed no lawyers' testimony on the matter. But a competent attorney, Mr. Ross, did testify, he was the only witness called. The court announced its decision of February 13, 1939, and on that date counsel for defense notified the court in the presence of the plaintiffs' counsel that the defendants desired to offer testimony as to the value of services performed. The case was continued until March 10. Certainly the plaintiffs had an abundance of opportunity to offer testimony on the subject. They made no offer. Therefore, they cannot now complain, nor should they, for the fees allowed were reasonable. We here state that it was unknown to the defendants' counsel that Mr. Ross' law

firm had happened to be representing one of the defendants in some other matters. But that is of little consequence, because these counsel fees, as everyone well known, go to counsel and not to defendants. So as a matter of fact, Mr. Ross was testifying for the benefit of counsel and not for defendants.

Plaintiffs sought judgment in the discretion of the court and as limited by the copyright law. That law fixes a minimum damage of $250.00 dollars and maximum damages of $5,000.00 plus costs and counsel fees *per each infringement.* Plaintiffs accused Tarry Inn of committing four infringements, calling for maximum damages of $20,000.00 plus costs and attorneys' fees; against the Trianon five counts or $25,000.00 damages plus, etc.; against Lockhart, eleven counts or $55,000.00 plus costs; or a total of $100,000.00 plus. In discussing the matter with the trial court, counsel stated they did not desire heavy damages; just the minimum damages. Of course, *they* were heavy enough, but if plaintiffs did not mean business when they filed the suits, why did they so word their complaint, and why the eleven counts? The defendants had to try the cases on the pleadings as drawn. If plaintiffs merely wanted to jog Lockhart's memory, they could have sued on only one count. There must have been a good reason for

eleven counts.

The principal briefs and arguments in these cases were made in March, April and May, 1937; *The arguments were so extended and the briefs so involved and elaborate, that the court held the matter under advisement for over nine months before making a decision on the matters therein discussed.* That one fact is sufficient to show that counsel for defendants had made unusual preparation for the defense of these cases.

True, since plaintiffs lost, of course, they are willing to talk about minimum damages. Although minimum damages would total $5,000.00 plus costs and counsel fees. Imagine the thousands of sandwiches Lockhart would have to sell in his little eating place in order to take in $3,000.00; let alone paying out such a sum. But plaintiffs have obtained larger fees in some of their other cases in which the litigation was brief and contested lightly in comparison to these cases. Here are a few of such cases.

Witmark vs. Pastime Theatre, 298 Fed. 470 $100.00 per count.

Buck vs. Jewell La Salle, 32 Fed. (2nd) 366 $100.00 per count.

Feist vs. Dreamland Ballroom, 36 Fed. (2nd) 354 $100.00 per count, three counts, $300.00.

Witmark vs. Calloway, 22 Fed. (2nd) 412 $250.00 for one count.

Remick vs. General Electric, 16 Fed. (2nd) 829—$1000.00 for one count. This case indicates that the courts have given attention to cases where lots of work has been involved.

Waterson, Berlin & Snyder vs. Tollefson, 253 Fed. 859 — $100.00 attorney fee for one count. The court points out that there is a maximum penalty of $5,000.00.

These cases show an average of $250.00 per count.

Schellberg vs. Empringham, 36 Fed. (2nd) 991.

This was one of plaintiffs' cases. We have already pointed out that a fee of $2,500.00 was allowed counsel in a case that was not half so important as the cases here on appeal. There were but three counts there, while here there are twenty. Furthermore, this case *ended in the District Court.*

Stodart vs. Mutual Film Corp., 249 Fed. 507.

Cited on page 16 of plaintiffs' brief. A fee of $300.00 was allowed on a judgment of but $900.00. Practically the same as was allowed by Judge Cushman. This case also ended in the lower court.

CONCLUSION

If we eliminate from plaintiffs' brief those statements which are a repudiation of their own evidence, we find little to answer. Certainly there would not be sufficient left to warrant this appeal. It is clear from plaintiffs' own evidence and argument, without even a word from any of the defendants, that these

suits should never have been brought. Nearly three years ago these rich and powerful plaintiffs hailed these little folks into court and they have unmercilessly kept them there. For this we fail to see one, single, valid reason.

We can understand how the management of the Society, being thousands of miles from the State of Washington, and necessarily having to let subordinates handle these matters, should have ordered these suits, and in so doing might have labored under proper motives, but as soon as the defendants filed their answers, the Society's officials most surely realized that the suits were without proper foundation; yes, without any foundation. Upon learning of that, they should have immediately withdrawn these cases. For plaintiffs to have continued this litigation merely because they are strong and because they know these defendants cannot possibly stand the heavy costs necessarily herein incurred, is little short of—we were going to say criminal—well, that seems to be the right word. Courts are maintained for the settling of fairly honest differences of opinion, not for permitting the strong to wear down the weak with endless litigation. We fail to find in plaintiffs' brief a good and sufficient reason for bringing this appeal.

Let us assume that the Society's officials actually

believed the state court was going beyond its bounds in issuing the injunction and appointing the receiver. But since they accepted and endorsed the state court's final order, it is definite that plaintiffs were not acting in good faith when they offered in evidence Stanley's letters of cancellation and his testimony of having flouted the state court's orders. Such evidence is both ridiculous and false and should not be honored by this or any tribunal.

For these reasons we feel that plaintiffs should be penalized for having continued this litigation and for having brought this wholly unwarranted appeal. We are asking a penalty of $500.00, which is but ten per cent of the minimum damages sought by plaintiffs in these suits. There is an abundance of authority for such action.

Slaker vs. O'Connor, 278 U. S. 188.
Roe vs. Kansas, 278 U. S. 191
Mississippi et al vs. Aultman, 296 U. S. 537.
Winston vs. Stover, 299 U. S. 508.

This last case went up from this state

> "The motion of the appellee to allow damages is granted, and it is ordered that damages of one thousand dollars, payable to appellee, to be taxed against appellant."

The decisions of the lower court should be affirmed and the sum of $500.00 should be added to the judg-

ments there rendered against the plaintiffs.

Respectfully submitted,

CLARK R. BELKNAP,
Attorney for Appellee.

(A Portion of the Affidavit of Clark R. Belknap, Filed With the Motion to Dismiss Appeal. Caption Omitted.)

State of Washington, County of King, ss.

CLARK R. BELKNAP, being first duly sworn, on oath deposes and says:

That he is the attorney for the defendants in the above and affiliated cases; that after hearing testimony of a witness for defendants and argument of counsel, the court awarded the counsel fees specified in the decree; that a few minutes after the court awarded the fees aforesaid the said H. W. Haugland addressed the court in about the following words: "Since the court is allowing $100.00 per count in these cases I believe the plaintiffs should be allowed counsel fees of $100 per count, or $600.00 and $800.00 in the cases in which the plaintiffs prevailed"; that thereupon the trial judge replied in words about as follows: "No, I don't want you to play horse with the court; you said plaintiffs did not desire special counsel fees in those cases; you must abide by that statement; your request is denied."

CLARK R. BELKNAP.

Subscribed and sworn to before me this 5th day of September, 1939.

H. M. JOHNSON,
Notary Public in and for the State of Washington, residing at Seattle.